STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

JOHN RICHARDS HOMES BUILDING COMPANY, LLC,
a Michigan limited liability company,

Plaintiff,

-v-

HONIGMAN MILLER SCHARTZ AND COHN, LLP, a Michigan limited liability partnership,

Defendant.

Case No. 15-000236-CB

Hon. Daniel P. Ryan

OPINION

This civil matter is before the Court on a motion for summary disposition filed by Defendant, Honigman Miller Schwartz and Cohn, LLP ("Honigman"). For the reasons stated below the Court will grant in part and deny in part the motion.

I. FACTUAL AND PROCEDURAL HISTORY

The instant motion arises out of a complaint filed by Plaintiff, John Richards Homes Building Company, LLC, against Honigman alleging legal malpractice, breach of fiduciary duty, and common law and statutory conversion along with a request for a declaratory judgment stating that the unearned portion of the funds retained by Defendant are the property of Plaintiff.

Plaintiff is a luxury home builder with a prior long-term professional relationship with Defendant which served as its counsel for several years. The instant motion revolves around several matters involving Kevin Adell. Defendant represented Plaintiff in the Adell

matters. One of the matters was a petition for involuntary bankruptcy filed by Adell for a disputed breach of contract claim against Plaintiff. The Bankruptcy Court dismissed the petition and found that it had been filed in bad faith and awarded $6.4 million to Plaintiff, which included $2 million in punitive damages. Defendant then sought additional punitive damages and, in 2011, the Bankruptcy Court awarded $2.8 million in additional punitive damages and $1.8 million in additional attorney fees because of Adell's post-judgment conduct and evasion from the judgment. Adell then depositied $5.1 million with the Bankruptcy Court to stay enforcement of the award pending appeal. On appeal, the additional award of $2.8 million in punitive damages was reversed, but the $1.8 million in attorney fees was affirmed. Defendant Honigman then terminated its representation of Plaintiff and filed a motion in Bankruptcy Court to have the $1.8 million in attorney fees disbursed to it. Plaintiff opposed the motion, but the court ordered disbursement of the funds to Defendant. Plaintiff did not appeal the disbursement order.

Plaintiff then filed its complaint against Defendant and the instant motion followed.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7) AND (C)(8)

A motion may be brought under MCR 2.116(C)(7) on the following grounds:

> The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

Defendant claims that either there was a prior judgment barring certain of Plaintiff's claims by res judicata or that Plaintiff's claims are barred by the statute of limitations. A moving party may support the motion with affidavits, depositions, admissions, or any other

documentary evidence, MCR 2.116(G)(2); 2.116(G)(5), which would be admissible at trial. MCR 2.116(G)(6). "The contents of the complaint are accepted as true unless contradicted by the evidence provided." *Odom v Wayne Co,* 482 Mich 459, 466; 760 NW2d 217 (2008).

MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under (C)(8) tests the legal sufficiency of the complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may consider only the pleadings in rendering its decision. *Id*. All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie*, *supra* at 130.

III. ANALYSIS

A. LEGAL MALPRACTICE

Plaintiff first alleges that Defendant is liable for legal malpractice for three reasons: (1) that Defendant failed to dispute usurious interest rates of Oasis Legal Finance ("Oasis"), a litigation funding company, that provided interim funds to Plaintiff during the Adell litigation and encouraged Plaintiff to settle with Oasis; (2) that Defendant failed to timely seek prejudgment interest against Adell; and (3) that Defendant failed to timely seek punitive damages under 11 USC 303(i).

The elements of legal malpractice are: (1) the existence of an attorney-client relationship; (2) negligent legal representation; (3) that the negligence proximately caused an injury; and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648,

655; 532 NW2d 842 (1995). Attorneys must only act as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances. *Id* at 650. "An attorney has the duty to fashion such a strategy so that it is consistent with prevailing Michigan law. However, an attorney does not have a duty to insure or guarantee the most favorable outcome possible. An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession." *Id* at 656. There is no dispute that Defendant represented Plaintiff in the Adell matters. Whether Defendant acted negligently is the issue that must first be considered before considering causation and injury.

With respect to Oasis' allegedly usurious interest rate, Plaintiff signed an agreement with Oasis that the agreement would be governed by the laws of the state of Illinois. After Oasis sought payment of $4.3 million from Plaintiff, Plaintiff settled with Oasis for $3 million in 2006. Defendant argues that this claim is time barred having been filed 9 years after the claim accrued.

Under Michigan law, statute of limitations for legal malpractice claims is two years from the last day of an attorney's service to the client, MCL 600.5805(6) and MCL 600.5838(1). Even invoking the "discovery rule," MCL 600.5838(2), at the latest, it must be filed within "6 years after the date of the act or omission that is the basis for the claim." MCL 600.5838b(1)(b). Such an action is barred if it not commenced within that time period. MCL 600.5838b(2)(1). "[A] plaintiff's legal malpractice claim accrues on the day that the attorney last provides professional service in the specific matter out of which the malpractice claim arose." *Kloian v Schwartz*, 272 Mich App 232, 238; 725 NW2d 671 (2006).

The specific matter about which Plaintiff complains is the alleged usurious interest rate charged by Oasis. The debt was settled in 2006 and, with the assistance of another attorney in settlement negotiations, the matter was concluded in 2006. Even if Plaintiff were to invoke the discovery rule under MCL 600.5838(2), it should have discovered the basis for its claim of malpractice as to Oasis' allegedly usurious rates because, on May 1, 2006, Defendant had already advised it that the usury defense probably would not be effective. Thus, Plaintiff knew of the possibility of Defendant's alleged failure to counsel it on a usury defense 9 years before filing its complaint, particularly in light of the fact that it had the assistance of another attorney at the time of settlement. Thus, pursuant to MCL 600.5805(6), MCL 600.5838(2), and MCL 600.5838b(1), this claim is time barred and the Court will grant summary disposition pursuant to MCR 2.116(C)(7).

Plaintiff next alleges that Defendant was negligent for failing to initially seek punitive damages under 11 USC 303(i) rather than under 11 USC 105(a). The original motion for punitive damages was filed in 2006. Plaintiff contends that Defendant should have moved to amend the motion to add section 303(i) to the motion. Plaintiff further claims that the second award of punitive damages would have been affirmed had Defendant added section 303(i) to the initial motion. The Court disagrees. Section 303(i)(2)(B) provides only for punitive damages upon dismissal of an involuntary bankruptcy which had been filed in bad faith. The section cannot later be the basis for a post-dismissal motion for punitive damages. *In re John Richards Homes Building Co*, 552 Fed Appx 401 (CA 6, 2013).

11 USC 105(a) empowers a Bankruptcy Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No

provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." While the Bankruptcy Court is empowered to order any judgment necessary to carry out the provisions of the bankruptcy code under section 105(a), it is not empowered to award punitive damages under section 303(i) for post-judgment conduct and only empowers the court to impose punitive damages for pre-judgment conduct such as filing a case in bad faith. See *In re Val W Poterek & Sons, Inc*, 169 BR 896 (1994)(A court's finding of bad faith on the part of a petitioning creditor is necessary for an award of punitive damages to debtor after dismissal of an involuntary petition.).

Thus, Plaintiff's claim that Defendant's failure to invoke section 303(i) in a timely fashion with the goal of procuring punitive damages for post-judgment conduct constitutes negligence is without merit.

Plaintiff alternatively argues that Defendant was negligent for failing to timely seek the interest it paid to Oasis as compensatory damages for the involuntary bankruptcy filing which was the result of Adell's bad faith decision to pursue a judgment against Plaintiff by filing the petition. Again, as explained above, the specific matter out of which this claim arose was concluded in 2006, *Kloian, supra,* rendering this claim as untimely and will be dismissed pursuant to MCR 2.116(C)(7).

Plaintiff next argues that Defendant was negligent for failing to seek pre-judgment interest as to attorney fees and cost that Plaintiff paid between 2003 and 2006. During this

time period, Plaintiff alleges that it paid Defendant $1,714,160 for services in the Adell matters along with an additional $527,106 to Florida bankruptcy counsel between 2004 and 2006. Plaintiff also alleges that it paid in 4 payments a total of $41,322.48 to Florida counsel. Plaintiff claims that Defendant should have timely moved for prejudgment interest. As Defendant rightly argues, this claim has no merit and the U.S. District Court agreed. The District Court held in relevant part:

> Even if JRH's request were somehow timely, the Court finds ample reason to deny it.
>
> ***
>
> ... JRH's brief clearly seeks interest on the $1.8 million in attorney fees from the 2011 Fee and Cost Award.
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> ***
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> Finally, prejudgment interest is not mandated when a federal law is violated. The Court must consider four factors: (1) the need for full compensation of an injured party; (2) considerations of fairness and the relative equities of the award; (3) the remedial purpose of the statute involved; and, (4) such other general principles as the Court deems relevant.
>
> ... the Court finds they do not favor an award of prejudgment interest for the following reasons: (1) JRH has been fully compensated with both compensatory and punitive damages; (2) it would be unfair for the Court to award JRH prejudgment interest three years postjudgment; (3) the remedial purpose of section 303(i) is to "restor[e] the victim of a frivolous involuntary bankruptcy filing to his or her financial status prior to the proceeding," *In re John Richards Homes Bldg Co*, LLC, 475 BR at 599, which does not include prejudgment interest on fees; and, (4) no other consideration justifies an untimely award of prejudgment interest.
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> *In re John Richards Homes Bldg Co,* LLC, 523 BR 83, 89-90 (2014).

Thus, the District Court found no reason to justify an award of pre-judgment interest even if a request had been timely made. Furthermore, Plaintiff never appealed this decision. This Court is bound by that decision. Therefore, this claim is also meritless. Not only did the District Court aver that no reason justified an award of pre-judgment interest, but the claim that Defendant was negligent for failing to timely make the request for prejudgment interest is in itself untimely as it relates to legal malpractice. Therefore, the Court will grant Defendant's motion as to the legal malpractice count and will dismiss it.

B. BREACH OF FIDUCIARY DUTY

Plaintiff's next claim is that Defendant breached its fiduciary duty to Plaintiff by retaining all of the $1.8 million in attorney fees which were released by the Bankruptcy Court. Plaintiff argues that it owes, at most, approximately $864,000.

Generally, relief for a breach of fiduciary duty may be sought when a "position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). The Michigan Court of Appeals has held that a breach of fiduciary duty claim differs from a malpractice claim because "[t]he conduct required to constitute a breach of fiduciary duty requires a more culpable state of mind than the negligence required for malpractice." *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005).

Although Defendant has retained the funds, it has not breached its fiduciary duty because it has retained the funds in its trust account. Defendant has not abused a position of influence or betrayed confidence. *Vicencio, supra*.

After a final adjudication, Defendant had filed an ex parte motion for release of funds retained pursuant to a stay order. The Bankruptcy Court's order releasing the funds clearly states that Defendant had been awarded additional attorney fees by the Bankruptcy Court in the amount of $1,854,192.73 and was entitled to that amount plus interest because the final adjudication had occurred and the additional award had been affirmed by the District Court. Plaintiff had filed objections to Defendant's motion for the release of the funds. The order stated that nothing in the order prevented Plaintiff from asserting additional claims to the funds.

At the time of the filing of its motion, Defendant had already terminated its representation of Plaintiff. Defendant cannot have breached its fiduciary duty because its representation of Plaintiff had been terminated and the Bankruptcy Court acknowledged Defendant as an "independent appellee." Plaintiff never appealed the Bankruptcy Court order releasing the funds. For these reasons, the Court will dismiss Plaintiff's claim of breach of fiduciary duty.

C. STATUTORY AND COMMON LAW CONVERSION

Plaintiff's third claim is for statutory and common law conversion in which it claims that Defendant has wrongfully exercised dominion and control over the attorney fees released to it by the Bankruptcy Court. Common law and statutory conversion differ. Common law conversion has been defined as follows:

> The tort of "conversion" is an intentional exercise of dominion and control over personal property or a chattel, that so seriously interferes with right of another to control that property that the tortfeasor may justly be required to pay the other the full value of the property.
>
> 18 Am Jur 2d Conversion §1, p 154.

"The gist of conversion is the interference with control of the property." *Sarver v Detroit Edison Co*, 225 Mich App 580, 585; 571 NW2d 759 (1997), quoting Prosser & Keeton, Torts (5th ed), § 15, p 102.

Statutory conversion is governed by MCL 600.2919a, which provides in pertinent part:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.

The claim of conversion as it relates to attorney fee disputes also implicates the Michigan Rules of Professional Conduct, specifically MRPC 1.15(c), which mandates:

> When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

The instant matter is, in essence, a fee dispute. When such a dispute arises, the lawyer must keep separate the monies until the dispute is resolved. Defendant has kept the attorney fees at issue in its separate trust account. From that perspective, it has not exercised dominion and control over the fees. The fees are controlled by MRPC 1.15(c). Nor has Defendant converted the property to its own use. MCL 600.2919a(1)(a).

In addition to these considerations, the Court must examine the fee agreement between the parties. The fee agreement between the parties dated November 23, 2005 specifies that Defendant has a charging lien, a retaining lien, and a security interest. “The special or charging lien is an equitable right to have the fees and costs due for services

secured out of the judgment or recovery in a particular suit. The attorneys' charging lien creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services. In this case, defendant is asserting the right to a charging lien." [Authorities omitted] *George v Sandor M Gelman, PC*, 201 Mich App 474, 476; 506 NW2d 583 (1993). "When there is a conflict between an attorney's charging lien and an opposing party's right of setoff against the same judgment, Michigan courts adhere to the policy that the attorney's charging lien takes precedence." *Mahesh v Mills*, 237 Mich App 359, 362; 602 NW2d 618, 620 (1999). Thus, Defendant's charging lien is superior to Plaintiff's claim for a set-off.

Plaintiff, however, disputes the total amount it owes, yet couches its claims in a tort action rather than in a contract action. Because Defendant has neither wrongfully exercised dominion over the funds nor has it converted the funds to its own use, Plaintiff's claim for conversion fails as a matter of law.[1] See also *Lester N Turner, PC v Eyde*, 182 Mich App 396; 451 NW2d 644 (1990) (An attorney is not precluded from receiving compensation

[1] The Court also notes that Plaintiff's claim is barred by res judicata because its argument is essentially the same as it posed in its objection to Defendant's ex parte motion and the Bankruptcy Court has already ruled on the matter.

Under Michigan law, res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those that were necessary in a prior action. *Begin v Michigan Bell Tel Co*, 284 Mich App 581, 599; 773 NW2d 271 (2009); *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v State*, 470 Mich 105, 121, 680 NW2d 386(2004). "For res judicata to apply, the prior action must also have resulted in a final decision." *Begin, supra*, citing *Richards v Tibaldi,* 272 Mich App 522, 531; 726 NW2d 770 (2006).

merely because the client disagrees with the accounting system or payment schedule employed by attorney.). Therefore, the Court will grant summary disposition pursuant to MCR 2.116(C)(8) as to the conversion claim.

D. REQUEST FOR DECLARATORY JUDGMENT REGARDING OWNERSHIP OF THE FUNDS

Plaintiff's last claim is for a declaratory judgment that it is entitled to the unearned portion of the $1.8 million. MCR 2.605(A) governs declaratory judgments and provides:

> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.
>
> [Emphasis added].

"The Declaratory Judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978).

Both parties have submitted evidence of the amount due from Plaintiff. They do not agree. As to the Adell matters, Defendant's evidence is in the form of a running tally. The summary total indicates an outstanding amount of $1,342,912.32 not including interest. Including interest, the total amount is $1,983,711.51. Conversely, Plaintiff claims that it owes, at most, $864,210.77. In support, Plaintiff provides an invoice dated April 24, 2014 referencing the "Matter #74692 - Adell, Kevin." [Plaintiff's Complaint, Exhibit A]. The total due on the matter pursuant to the invoice is $864,210.77. Even with the addition of

interest to this amount, the total would not reach the level sought by Defendant. Hence, as to the amount due, there is an "actual controversy" as to the unearned portion of the $1.8 million disbursed to Defendant. Plaintiff has sought judgment on the unused portion of the funds. Defendant disputes that any portion is unused and both parties have submitted conflicting evidence. Therefore, the Court will deny Defendant's motion as to declaratory judgment, but will conduct further proceedings to determine the parties' ownership interests in the funds and appropriate division of the funds, if any.

IV. CONCLUSION

Therefore, for the reasons stated above, the Court will grant Defendant's motion for summary disposition as to legal malpractice, breach of fiduciary duty, and conversion. The Court will deny Defendant's motion for summary disposition as to Plaintiff's request for declaratory judgment and will conduct further proceedings to determine the parties' ownership interests in the funds and appropriate division of the funds, if any.

DATED: 4/13/2015

/s/ Daniel P. Ryan
Circuit Judge